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THE EFFECT OF A NATIONAL BANKRUPTCY LAW UPON STATE LAWS.

FOUR National Bankruptcy Acts have been passed since the adoption of the Constitution under the authority given to Congress in that instrument "to establish . . . uniform laws on the subject of bankruptcies throughout the United States."[1] But it is still to some degree uncertain what the effect of such national laws is upon the powers of the several states. It is clearly established that when no national act is in force, states have full power to pass bankruptcy laws.[2] The only limitation at such a time on the power of the states is the constitutional prohibition against impairing the obligation of contracts. Owing to this prohibition, even though no national law is in force, a state cannot by a bankruptcy or insolvency law discharge a debt arising either under a contract entered into before the discharge of the state law in question or under a contract made without the state.[3]

But the powers of the states when Congress has passed a bankruptcy law are by no means so clear. It is indeed agreed that the federal law is paramount, and that the states must yield to its authority if collision arises;[4] and that state laws in so far as they conflict with a national bankruptcy law are not thereby destroyed,

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[1] Art. 1, § 8.

[2] Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122.

[3] This matter was elaborately discussed in Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, and the law is now settled with very little difference of authority. See 6 HARV. L. REV. 349.

[4] *In re* Watts, 190 U. S. 1.

but at most merely suspended during the existence of the federal statute.[1] But beyond this there is the greatest difference of opinion. If a state has in force a bankruptcy law at the time a national act is passed, even though the state law is similar in some or all of its provisions to the national act, the view is taken by some authorities that the state law remains in force and proceedings may be had under it so long as bankruptcy proceedings are not actually begun under the federal law.[2] This is certainly an inconvenient doctrine, for, as the federal court confessedly may demand the property of a bankrupt from the state court when proceedings have been begun under the national act, there can be no certainty of result in any proceedings begun in the state court. Such proceedings are liable to be terminated at any stage by an adjudication against the bankrupt in the federal court. Extended consideration of the point is unnecessary, for the cases just referred to are so distinctly opposed, not only to the weight of authority in state courts, but to the views expressed by the Supreme Court of the United States, that it must now be generally admitted that the state law is wholly suspended so far as it covers the same ground as the national act.[3] But though many states have on their

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[1] Tua *v.* Carriere, 117 U. S. 201; Butler *v.* Goreley, 146 U. S. 303; Lothrop *v.* Highland Foundry Co., 128 Mass. 120. So a state law on the subject of bankruptcy passed while a federal statute is in force goes into effect automatically on the repeal of the latter law. Palmer *v.* Hixon, 74 Me. 447.

[2] *Re* Scholtz, 106 Fed. 834 (D. C. Ia.); Maltbie *v.* Hotchkiss, 38 Conn. 80, 83; Reed *v.* Taylor, 32 Ia. 209; *Ex parte* Ziegenfuss, 2 Ired. (N. C.) 463.

[3] This view was expressed by the Supreme Court in Tua *v.* Carriere, 117 U. S. 201, 209, 210. In speaking of the effect of the federal bankruptcy law on the insolvent law of Louisiana (which was in reality a bankrupt law), the Court said: "The effect of the Bankrupt Act would have been to suspend it only while the Bankrupt Act remained in force, and on its repeal the Insolvent Law would have revived. Ward *v.* Proctor, 7 Met. (Mass.) 318; Lothrop *v.* Highland Foundry Co., 128 Mass. 120; Orr *v.* Lisso, 33 La. Ann. 476. . . . If those laws [Louisiana insolvent laws] had been enacted for the first time, they would, so far as inconsistent with the Bankrupt Act, have been inoperative while that act remained in force, but upon its repeal would have come into operation." The reasoning of the Supreme Court in Mayer *v.* Hellman, 91 U. S. 496, and Boese *v.* King, 108 U. S. 379, is also based on a similar assumption. Neither of these decisions directly involved the question; for in each case there had been an adjudication in bankruptcy, and the point at issue was whether state laws under which assignments by the debtors had been made previously were bankrupt laws, and as such suspended by the national act. That the state laws were suspended if they were bankrupt laws is clearly assumed. To the same effect are Carling *v.* Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1; *Re* Storck Lumber Co., 114 Fed. 360; *Re* F. A. Hall, 121 Fed. 992; *Ex parte* Eames, 2 Story (U. S.) 322; Com. *v.* O'Hara, 1 N. B. R. 87; Thornhill *v.* Bank, 3 N. B. R. 435, 5 N. B. R. 367; Ketcham *v.* McNamara, 72 Conn. 709; Harbaugh *v.* Costello, 184 Ill. 110; Beach *v.* Miller's

statute books laws dealing with the subject of bankruptcy, it would be hard to find two states whose laws are identical with one another, and no state has a law identical with the national act. Some states have enforced, during the periods when there has been no federal statute on the subject, systematic bankruptcy laws, varying in detail, but providing for involuntary as well as voluntary distribution of a debtor's property and for the debtor's discharge from all provable debts, though such state laws have not generally been called bankruptcy laws. These states are California, Connecticut, Georgia, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, North Dakota, Rhode Island. In other states more or less partial systems have prevailed, and the chiefly disputed question is this: are these state bankruptcy laws, complete or partial, suspended altogether on the passage of a federal bankruptcy law, or are such parts of them still in force as relate to persons or matters not covered by the national law? The latter answer seems to have been suggested by Chief Justice Marshall.[1] And support for it is to be found in state decisions relating both to earlier national bankruptcy laws and also to that now in force. While the national law of 1867 was in force, it was held by the Supreme Court of Connecticut that as that act applied only to cases where the debtor owed provable debts exceeding the amount of $300, the state insolvent law which contained no such limitation remained in force as to debtors owing amounts insufficient to give the federal court jurisdiction.[2]

Exrs., 15 La. Ann. 601; Duffy *v.* His Creditors, 48 So. 120 (La.); Moody *v.* Port Clyde Development Co., 102 Me. 365; Van Nostrand *v.* Carr, 30 Md. 128; Griswold *v.* Pratt, 9 Met. (Mass.) 16; Lyman *v.* Bond, 130 Mass. 291; Parmenter Mfg. Co. *v.* Hamilton, 172 Mass. 178; Rowe *v.* Page, 54 N. H. 190; E. C. Wescott Co. *v.* Berry, 69 N. H. 505; Mauran *v.* Crown Carpet Lining Co., 23 R. I. 324.

[1] Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 195. "It does not appear to be a violent construction of the Constitution, and is certainly a convenient one, to consider the power of the States as existing over such cases as the laws of the Union may not reach." Marshall adds: "Be this as it may, the power granted to Congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states."

[2] Shepardson's Appeal, 36 Conn. 23. In Geery's Appeal, 43 Conn. 289, the court sustained involuntary proceedings under the state insolvent law against a corporation, it not appearing that the corporation had committed an act of bankruptcy under the

Similarly, since the present national act has been in force, the Court of Appeals of Maryland has held that the state law is still operative as to farmers, since they are excepted from involuntary bankruptcy under the national law.[1] And wage-earners and farmers have likewise been held by the Pennsylvania Superior Court to be subject to proceedings under the state insolvency law, though that law has been suspended as to other persons.[2] The Supreme Court of California, following the same line of reasoning, prior to 1903 held the local law applicable to mining corporations which, until the amendment of that year, were excluded from the operation of the federal law;[3] and has also held that corporations of all kinds may begin voluntary proceedings under the state law, since they are not permitted to do so under the national act.[4] It is easy to imagine other applications of the same doctrine. If these decisions are sound, all persons not subject to bankruptcy proceedings under the National Act may be made subject to state laws; all persons excluded from voluntary proceedings may be allowed to institute them in state courts; all persons excluded from involuntary bankruptcy may be subjected to it by the states; the states may establish for all classes of persons any other acts of bankruptcy in addition to those enumerated in the national act, and such additional acts of bankruptcy may be made the basis of adjudication and administration in the state courts; for as to all these matters the federal act is silent, neither providing for federal proceedings nor in express terms forbidding state action.

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national act, nor that a sufficient number of creditors wished to institute proceedings in bankruptcy. The court say (p. 298): "So far as that act assumes and takes jurisdiction of the parties and of the subject matter, just so far is the jurisdiction of the state court excluded. On the other hand, we contend that in respect to all persons and matters over which the bankrupt act declines to take jurisdiction, the statute of this state remains in full force." But this doctrine was held, if sound under the act of 1867, not sound under the act of 1898 in Ketcham *v.* McNamara, 72 Conn. 709. In that case an assignment under the state law was held to give the assignee not even a voidable title, though no bankruptcy proceedings had been begun.

In the early case of Clarke *v.* Ray, 1 H. & J. 318, 320, it was said: "The legislatures of the several states have competent authority to pass laws for the relief of all persons who are not comprehended within the act of Congress." See also Simpson *v.* City Savings Bank, 56 N. H. 466; Carter *v.* Sibley, 4 Met. (Mass.) 298, per Shaw, C. J.; Tobin *v.* Trump, 7 Phil. 123.

1 Old Town Bank *v.* McCormick, 96 Md. 341.

2 *Re* Rittenhouse's Insolvent Estate, 20 Pa. Super. Ct. 468; Citizens' Nat. Bank *v.* Gass, 29 Pa. Super. Ct. 125; Miller *v.* Jackson, 34 Pa. Super. Ct. 31.

3 R. H. Herron Co. *v.* Superior Court, 136 Cal. 279.

4 Keystone Driller Co. *v.* Superior Court, 138 Cal. 738.

On the other hand, in Massachusetts, the state insolvency courts are altogether closed, and no proceedings under the state law would be entertained against any one for any cause, the theory established in Massachusetts being that the national system has altogether superseded the state system.[1] The same rule has been applied in Illinois[2] and Maine.[3]

It is submitted that this doctrine is correct and that all state laws which can properly be called bankruptcy laws are altogether suspended.

It need not be contended that Congress has not the power to pass a bankruptcy law confessedly partial, and that if Congress does this, the states may enact laws to cover the remainder of the ground. It is enough to assert that Congress has manifested an intent to deal with the whole subject of what is commonly called bankruptcy legislation. Any argument on this point must take into consideration the extent of the grant of power to Congress in the Constitution; that is, a meaning must be given to the words used in the Constitution, — "The subject of bankruptcies." The Constitution was written and adopted with the English system in mind, and it might be urged forcibly, and indeed it has been contended, that Congress was limited in its power over bankruptcy legislation to laws analogous to the English bankruptcy laws in force at the end of the eighteenth century. The English law at that time was confined in its operation to traders, and provision was made for involuntary bankruptcy only. But it is to be observed that the English bankruptcy law had not uniformly preserved the same boundaries. Prior to the reign of Queen Anne, discharges in bankruptcy were unknown, and were first allowed by statutes passed for a brief term of years as a temporary expedient. Other less striking but still important changes had from time to time been made. The framers

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1 Parmenter Mfg. Co. *v.* Hamilton, 172 Mass. 178.

2 Harbaugh *v.* Costello, 184 Ill. 110. The Illinois voluntary assignment law was held to be wholly superseded and suspended by the national act.

3 Moody *v.* Port Clyde Development Co., 102 Me. 365, 383. "The proposition might be plausibly suggested that a corporation which cannot become a voluntary bankrupt should be permitted to take advantage of a state law giving it authority of its own motion, to wind up its affairs, by dissolution, collection of debts, and distribution of assets. But the proposition is not tenable." It seems probable that the Supreme Court of Connecticut would take the same position if compelled to decide the question. In Ketcham *v.* McNamara, 72 Conn. 709, an assignment under the state law was held void, but the assignor was one who had committed an act of bankruptcy for which he could have been adjudged a bankrupt, and therefore his case was clearly covered by the national act.

of the Constitution might reasonably expect that the English bankruptcy system in force in 1787 would be no more final than its predecessors had been. Such an expectation certainly would have been realized. Modern English bankruptcy law, like modern American bankruptcy law, includes within its scope voluntary proceedings, and is applicable to other classes of the community besides traders. The English law of today has indeed in some particulars been extended farther than the American law: notably, the estates of deceased insolvents may be settled in the bankruptcy courts in England. The uniform conclusion of American courts that the bankruptcy acts passed by Congress were constitutional, therefore, seems sound; though the Act of 1841 and the subsequent acts have contained a system of voluntary bankruptcy and have been applicable to classes of the community other than traders.[1]

It is not to be supposed that the present bankruptcy law or its predecessors fully exhaust the power of Congress. Marshall said, "A bankruptcy law may contain those regulations which are generally found in insolvent laws," and it has even been suggested that Congress may "establish uniform laws, on the subject of any person's general inability to pay his debts, throughout the United States."[2] If this be true, Congress has power to take altogether

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[1] In Adams *v.* Storey, 1 Paine C. C. 79, 82, Judge Livingston of the United States Supreme Court said: "So exclusively have bankrupt laws operated on traders, that it may well be doubted whether an Act of Congress subjecting to such a law every description of persons within the United States would comport with the spirit of the powers vested in them in relation to this subject." After the passage of the Act of 1841 it was held to be unconstitutional by Judge Wells of the United States District Court for the District of Missouri in *Re* Klein, 2 N. Y. Leg. Obs. 185, and an elaborate dissenting dictum to the same effect was pronounced by Judge Bronson in Sackett *v.* Andross, 5 Hill (N. Y.) 327; but the decision of the District Court in *Re* Klein was reversed in the Circuit Court by Judge Catron of the U. S. Supreme Court, 1 How. (U. S.) 277, note. The question was not raised in the United States Supreme Court, because under the Act of 1841 no bankruptcy cases could come before that court for review. Nelson *v.* Carland, 1 How. (U. S.) 265.

But many decisions in other courts sustained the validity of the Act. State Bank *v.* Wilborn & Phillips, 6 Ark. 35; Lalor *v.* Wattles, 8 Ill. 225; Hastings *v.* Fowler, 2 Ind. 216; Loud *v.* Pierce, 25 Me. 233; Thompson *v.* Alger, 12 Met. (Mass.) 428; Reed *v.* Vaughan, 15 Mo. 137; Kittredge *v.* Warren, 14 N. H. 509; Cutter *v.* Folsom, 17 N. H. 139; Kunzler *v.* Kohaus, 5 Hill (N. Y.) 317; McCormick *v.* Pickering, 4 N. Y. 276.

The Act of 1867, as a whole, was uniformly held constitutional. *Re* Silverman, 4 N. B. R. 522; *Re* Reynolds, 9 N. B. R. 50; *Re* Reiman, 11 N. B. R. 21; *Re* California Pacific R. Co., 11 N. B. R. 193. The constitutionality of the Act of 1898 has been conclusively settled by Hanover National Bank *v.* Moyses, 186 U. S. 181.

[2] Kunzler *v.* Kohaus, 5 Hill (N. Y.) 317, 321.

into the federal courts all matters covered by laws for the release of poor debtors, and for the distribution of insolvent estates of insane persons and deceased persons as well as all matters now commonly disposed of by receivers of insolvent corporations; but, though Congress may have the power to bring such matters within a bankruptcy law and thereby exclude the local law from further operation upon them, though they have for centuries been habitually disposed of outside of bankruptcy laws and courts, the intent to do this is not to be presumed. The term "bankruptcy laws" does not have now the identical meaning which it formerly had, and after another century will very probably not have the precise meaning it now has. The constitutional grant of power may be wide enough or elastic enough to accommodate itself to these changed meanings. But at any given time when Congress passes elaborate bankruptcy legislation the natural assumption is that Congress intended to deal with the whole subject at that time commonly regarded as belonging within the limits of a bankruptcy law, and the burden should clearly be thrown on one who asserts that Congress meant to cover either a more extensive or a narrower field.

If these principles are applied to the present situation, the Act of 1898, like the Act of 1867, and perhaps still more clearly, seems on a proper construction to manifest a purpose to deal with the whole subject of bankruptcy, up to the boundary that modern law fixes between bankruptcy legislation (whether state or federal) and other branches of the law. Any cases properly within that subject which are not covered by the act are omitted, because it seemed wise to Congress that in such cases bankruptcy proceedings should not be permitted, not because the power of passing appropriate legislation in regard to them was relegated to the several states. This is indicated by the nature of the exceptions from the operation of the act. Wage-earners and farmers were obviously excluded from involuntary bankruptcy because wage-earners belong to a class habitually favored in legislation on account of their limited means; and farmers were excluded presumably because they do not actively engage in trade, and because to deprive them of their farms would also deprive them of their means of subsistence. Corporations were excluded from voluntary bankruptcy because voluntary proceedings are intended for the relief of the bankrupt and to enable him to start afresh. Such relief while appropriate to an individual debtor is not appropriate

to corporations. Especially is this true when, as under the present act, corporations are allowed discharge in bankruptcy.[1]

The corporations which are excluded from involuntary bankruptcy are not trading corporations, and bankruptcy proceedings are generally not the best way of dealing with insolvent corporations of other classes. Bankruptcy necessarily involves a quick winding up of the affairs of the bankrupt. In the case of many corporations which are not engaged in trading, such hasty proceedings will be injurious not only to those directly interested in the corporations but to the public as well. An insolvent railroad corporation or insurance corporation may require a very different kind of procedure in order to produce the best results.

The difficulty of conceding to the state law operation on the persons excluded from the national law is further shown by the circumstances that the individual persons excluded from involuntary bankruptcy, either because of the nature of their business or because of insufficiency of indebtedness, are not excluded from voluntary proceedings; and, on the other hand, the corporations which are excluded from voluntary bankruptcy may, in many cases, be subject to involuntary proceedings. Had it not been decided by respectable courts, it would seem an astonishing contention that Congress when it allowed wage-earners and farmers the right to become voluntary bankrupts, but denied creditors the right to bring involuntary petition against them, intended to permit the states to enact legislation authorizing them to be made involuntary bankrupts. If involuntary proceedings were to be permitted at all against such persons, it is incredible that the federal bankruptcy court should not have been given jurisdiction over the matter. An unseemly conflict of authority is otherwise directly invited; for if an involuntary petition is allowed in a state court against a farmer, he may file a voluntary petition in the federal court, and the admitted supremacy of the bankruptcy law involves the conclusion that the state court must at once surrender the assets. Such a situation is inevitable in some cases, but surely Congress could not have intended directly to invite it.

If persons excluded from the operation of the national act by its terms are to be subject to state insolvency proceedings, it would seem equally true that acts of bankruptcy not included as ground for bankruptcy proceedings in the federal act might be made the

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1 *Re* Marshall Paper Company, 102 Fed. 872.

basis for similar proceedings under state laws. It might just as well be argued that Congress has left to the states power to deal with all other acts of bankruptcy beside those mentioned in the statute, as to say that Congress has left to the states power to deal with persons and corporations which are not subject to federal bankruptcy proceedings.

The closing sentence of the Bankruptcy Act also lends force to the argument that Congress intended to supersede all state legislation on the subject of bankruptcy. That sentence provides that "proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it."[1] An almost necessary inference from this sentence is that proceedings commenced under state insolvency laws after the passage of this act shall be superseded by it. The sentence in the act is without qualification, and warrants an equally unqualified inference that all subsequent proceedings against any persons, whether within the scope of the federal act or not, are no longer to be subject to state insolvency proceedings.[2] Finally, if the question is to be regarded as doubtful whether the states still retain power over persons and corporations excluded from the operation of the federal act, the doubt should be resolved if possible in favor of the national law and against a continued validity of the state laws. The purpose of the Constitution in conferring powers to pass bankruptcy laws upon Congress was, as the Constitution itself shows, that such laws might be uniform throughout the United States. A system can hardly be considered uniform when in some states a wage-earner or farmer is subject to involuntary bankruptcy while in other states he is not. Though the national law itself may still be uniform and the words of the Constitution thus be literally observed, their real intent is violated, for the intent can be nothing less than to give Congress the power to establish a system of bankruptcy which shall be uniform throughout the country; and whenever Congress passes a bankruptcy law it is to be assumed that the purpose of the law is to create a system uniform throughout the whole country.

Whether it be held that a federal bankruptcy law totally suspends all state bankruptcy laws, or suspends them only so far as they apply to the same persons, for the same causes, another question still

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[1] Sec. 71 (b).

[2] This reasoning is that of the court in Parmenter Mfg. Co. *v.* Hamilton, 172 Mass. 178.

remains: What state laws are to be regarded as included under the general designation of bankruptcy laws, and therefore are suspended altogether, if the view here contended for is sound; or are at least partially suspended, if the view upheld by the courts of California and Maryland is to be accepted? If all laws which concern the distribution of an insolvent debtor's property among his creditors be properly classed as bankruptcy laws, then state statutes which regulate the distribution of the insolvent estates of deceased persons, or which regulate the distribution of property under a general assignment for the benefit of creditors, or which provide for the relief of poor debtors from arrest, or for receiverships of insolvent corporations, must be suspended. But, as has been said, though the constitutional grant of power may possibly have this wide scope, it is not to be assumed, in the absence of clear language in a national act, that Congress intended to take to itself matters which had been generally dealt with under statutes not classed as bankruptcy laws or under common law rules. That national bankruptcy acts do not suspend all right on the part of the states to deal with insolvent estates has been settled by the Supreme Court of the United States.[1]

In order to arrive at a just conclusion it is necessary to consider the extent of the powers granted by the Constitution to the national government, and to consider historically the scope of the early English bankruptcy laws, and the situation at the time when the Constitution was adopted.

The early bankruptcy laws were intended solely for the benefit of creditors, and a bankrupt was regarded as a quasi-criminal. No discharge was allowed until the reign of Queen Anne, and it need hardly be said that voluntary bankruptcy was unknown until after discharges were allowed. Even after the reign of Queen Anne, the discharge was looked upon rather as a reward given to the bankrupt to induce him to make full disclosure of his assets and aid his creditors in obtaining as large a dividend as possible, rather than as something to which the bankrupt was of right entitled, and itself an important object of the bankruptcy proceedings. Voluntary petitions were not authorized until the nineteenth century, although prior to their allowance friendly creditors would some-

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[1] Mayer *v.* Hellman, 91 U. S. 496; Boese *v.* King, 108 U. S. 379. In these cases general assignments under state statutes were held effectual if no petition in bankruptcy was filed within six months, the period within which an act of bankruptcy had to be taken advantage of under the act of 1867.

times at the instance of the bankrupt file a petition against him in order that he might secure a discharge.

As the bankruptcy law was intended as an added remedy to enable creditors to collect their dues, it was only gradually that the English bankruptcy law limited creditors of a bankrupt debtor in pursuing also the remedies allowed by the common law. Moreover, as only traders were subject to bankruptcy, the partial relief against imprisonment for debt afforded to bankrupts protected only one class of the community. With the increase of humanitarian feeling at the beginning of the nineteenth century, laws were passed to enable debtors who had surrendered all their property to escape imprisonment. These laws were known as insolvent laws. Ultimately their substance was incorporated in the English Bankruptcy Law, and since 1861 they have been wholly merged in it. One of the great sources of confusion in dealing with the subject of state bankruptcy laws is the double use given to the words "insolvency" and "insolvent." According to the English usage an insolvency law is aimed to relieve a debtor from imprisonment for debt, while the primary aim of a bankruptcy law is the equal distribution of his property among his creditors. In the United States the English meaning of insolvency law or insolvent law may still prevail in some states.[1] But quite commonly an insolvent law or an insolvency law is used as a synonym for a state bankruptcy law. Perhaps because the federal Constitution gave Congress power to pass bankruptcy laws, it was thought best by state legislatures to give another name to their enactments, even though these enactments in fact were bankruptcy laws. As has already been said, a number of states have enforced, during the period when there has been no federal bankruptcy law, complete bankruptcy systems; but in no case has the name of bankruptcy law been applied to state legislation.[2]

In construing the Constitution it is desirable to bear in mind the meaning attached at the close of the eighteenth century to the word "bankruptcy." Doubtless the power of Congress was not intended to be confined and is not confined to the passage of

[1] Thus in New Jersey a law the primary purpose of which was to abolish imprisonment in certain cases is called an insolvency law. Steelman *v.* Mattix, 36 N. J. L. 344. A Pennsylvania statute having the same object was similarly designated. Sullivan *v* Hieskill, Crabbe (U. S.) 525.

[2] Thus the closing sentence of the federal statute of 1898 which refers to "State insolvency laws" doubtless means state laws that are in fact bankruptcy laws rather than laws relieving poor debtors from imprisonment for debt.

bankruptcy laws identical with the English laws then in force, but a clearly marked distinction then existing between bankruptcy laws and insolvency laws cannot be disregarded. Even if it be assumed that Congress might pass a bankruptcy law superseding all state laws for the relief of poor debtors from imprisonment, it is not to be assumed that such is the effect of a federal statute unless it clearly expresses its purpose. In the absence of clear expression to the contrary, the assumption should rather be that Congress expected such state laws to exist side by side with a bankruptcy statute, as was the case in England until 1861, and as has long been the case in Massachusetts. It seems clear, therefore, that at the present time a law which is confined in its operation to relieving a debtor from arrest or imprisonment is not suspended by a federal bankruptcy law.[1] Even though it is made a condition of freeing the debtor from liability of arrest and imprisonment that he shall assign all his property, not to the creditor who is proceeding against him, so far as is necessary to pay the latter's claim, but for distribution among all his creditors ratably, thereby introducing into the statute an element which formerly was and still is an essential purpose of a bankruptcy law; still, since the main purpose, if not the only purpose, of the statute is to protect the debtor from imprisonment, and since the ratable distribution of the debtor's assets is required only as an equitable condition of freedom from arrest, it would seem that the statute continued in force after the passage of a national bankruptcy law.[2] This question is only material in the older states, for in the others imprisonment for debt is totally abolished.

For similar historical reasons state statutes conferring on probate courts the distribution of the insolvent estate of deceased persons and of insane persons are not superseded.[3] The care and distribution of such estates has long been entrusted to probate courts, and unless Congress clearly manifests an intention to include such matters within the national system, the state laws will continue in force.

The most important question, however, relates to the effect of laws regulating general assignments for the benefit of creditors.

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[1] Stockwell *v.* Silloway, 100 Mass. 287, 105 Mass. 517; Steelman *v.* Mattix, 36 N. J. L. 344; Scully *v.* Kirkpatrick, 79 Pa. 324; Jordan *v.* Hall, 9 R. I. 218.

[2] Such was the decision in Steelman *v.* Mattix, 36 N. J. L. 344. *Cf. In re* Reynolds, 8 R. I. 485.

[3] Hawkins *v.* Learned, 54 N. H. 333.

The great majority of the states have never had any local bankruptcy system. Insolvent estates have been distributed, so far as they can be said to have been distributed at all, either under receiverships or more commonly under general assignments. In most of the states, unless an insolvent debtor chose to make a general assignment, he could not be forced to assign his property for distribution, and his creditors were left to enforce such common law remedies as they could against his property. That the right to make a general assignment for the benefit of creditors is not precluded by the passage of the federal bankruptcy law is clear upon principle, and has been settled by the Supreme Court of the United States.[1] For such an assignment takes effect not from any statute, but from the common law principles governing conveyances and trusts. If the owner of property may convey it to a trustee for one person, he may convey it to a trustee for any number of persons; that is, he may convey it to a trustee for the benefit of any or all of his creditors.

Prior to the enactment of the Bankruptcy Act of 1898 many of the states, however, had passed laws limiting the right of debtors to make general assignments, or giving a statutory effect to such assignments if certain rules were complied with. In many states preferences were forbidden; in others, the assignee or trustee under the assignment was required to settle the estate in performance of his trust under the supervision of the courts, which controlled the proof of claims by creditors and other matters, somewhat in the method of the bankruptcy court. In some states the debtor making the assignment was discharged from further liability to creditors who actually proved their claims.[2] A few states went even farther and allowed the debtor a discharge from all provable claims.[3]

It is obvious that statutes in the latter form approach very closely the portion of a bankruptcy law relating to voluntary petitions. The two objects of a bankruptcy law — equal distribution among creditors, and a discharge of the debtor from provable claims — are subserved. That so much of such a state statute as relates to the debtor's discharge is suspended by the federal law is

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1 Mayer *v.* Hellman, 91 U. S. 496; Boese *v.* King, 108 U. S. 379.

2 Arizona, Arkansas, Indian Territory, New Jersey, South Carolina, Texas (if cred itors receive 33⅓ per cent dividend), Wyoming.

3 Colorado, Idaho, New York, Oregon, Washington, Wisconsin.

settled. And by a bare majority of the Supreme Court it has been also decided that the suspension of this portion of the statute does not invalidate the assignment itself.[1]

In the decisions of state courts assignments made in compliance both with state laws and the principles of the common law have been upheld both under the Act of 1867[2] and under the Act of 1898.[3] On the other hand, assignments which derive their validity from a state statute have been held void under the Act of 1867[4] and under the law of 1898.[5]

A peculiar form of statute is in force in a few states which in certain instances operates as an involuntary transfer of the debtor's property. In Alabama, Connecticut, New Mexico, Pennsylvania, Tennessee, West Virginia, Wisconsin, it is enacted that an assignment with preferences by an insolvent debtor shall operate as an assignment of all his property for distribution ratably among his creditors. Such a statute has been held in Kentucky not to conflict with the national bankruptcy law and not to be suspended by it.[6] It is submitted, however, that such decisions are erroneous. The state law, as a punishment of the debtor or redress to his creditors for an act which is contained in all bankruptcy statutes as an act of bankruptcy, enforces the very consequences which are provided for in the bankruptcy act; namely, the sequestration and

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[1] Boese *v.* King, 108 U. S. 379. This case related to an assignment made under a New Jersey statute during the pendency of the federal act of 1867. The question involved was whether an assignment made under these circumstances was void. It was held by the court, Justices Mathews, Miller, Gray, Blatchford, dissenting, that the assignment was not void. It was conceded by the majority that "the local statute was from the date of the passage of the Bankruptcy Act inoperative in so far as it provided for the discharge of the debtor from further liability to creditors who came in under the assignment." But they held that as an assignment for the benefit of creditors was an effective common law conveyance, it did not cease to be so because of the statute. The minority of the court contended that the statute was an entirety, and the suspension of the provision relating to discharge involved the total invalidity of any conveyance made under the statute.

[2] Hawkin's Appeal, 34 Conn. 548; Maltbie *v.* Hotchkiss, 38 Conn. 80; Geery's Appeal, 43 Conn. 289; Cook *v.* Rogers, 31 Mich. 391; Thrasher *v.* Bentley, 59 N. Y. 649; Beck *v.* Parker, 65 Pa. 262.

[3] Patty-Joiner Co. *v.* Cummins, 93 Tex. 598; Jensen-King-Byrd Co. *v.* Williams, 35 Wash. 161; Binder *v.* McDonald, 106 Wis. 332; Duryea *v.* Muse, 117 Wis. 399. In both Texas and Wisconsin the court admitted that portions of the local statute providing for the debtor's discharge were superseded.

[4] Shryock *v.* Bashore, 13 N. B. R. 481; Rowe *v.* Page, 54 N. H. 190.

[5] Ketcham *v.* McNamara, 72 Conn. 709.

[6] Ebersole *v.* Adams, 10 Bush (Ky.) 83; Linthicum *v.* Fenley, 11 Bush (Ky.) 131; Downer *v.* Porter, 25 Ky. L. Rep 571, 76 S. W. 135.

distribution of the debtor's property. And the Pennsylvania law has been held suspended by the federal statute.[1]

A similar situation arises in regard to receiverships of insolvent corporations. The appointment of receivers is not dependent on statute. It is a recognized branch of equity jurisprudence. The primary object of their appointment is to protect the rights of a plaintiff as a mortgagee or judgment creditor; and the ratable distribution of an insolvent estate in the hands of the receiver, when it occurs, is due to the desire of the court of equity, which has once taken jurisdiction, to dispose equitably of the property under its control. In England receiverships are allowed by the side of bankruptcy laws. There is, therefore, no reason to suppose that in this country the mere fact that Congress has passed a bankruptcy law should suspend the ordinary equity powers of state courts to appoint receivers; and such seems to be the generally accepted view.[2] But in much the same fashion that state legislation in some jurisdictions has annexed incidents of bankruptcy legislation to assignments for the benefit of creditors, so statutes have been passed regulating receiverships, and in some instances adding rules of law in regard to them appropriate for bankruptcy legislation. Such statutes must be suspended at least to the extent to which they infringe upon the field appropriate for bankruptcy legislation, and it has been held in Maine,[3] Pennsylvania,[4] and Rhode Island,[5] that local statutes of this sort were suspended. It does not follow, however, that the ordinary equity jurisdiction to appoint a receiver is lost because a federal bankruptcy statute has been passed.

If bankruptcy proceedings are begun against a corporation for which another court has appointed a receiver, the receiver must surrender the property.[6] Comity, however, requires that applica-

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[1] Potts *v.* Smith Mfg. Co., 25 Pa. Super. Ct. 206; Peckham's Assigned Est., 35 Pa. Super. Ct. 330.

[2] Chandler *v.* Siddle, 10 N. B. R. 236; State *v.* Superior Court, 20 Wash. 545. See also Watson *v.* Citizens' Savings Bank, 5 S. C. 159. And the general practice of state courts to this effect is indicated by the decisions cited in notes 6 and 1, *infra*, where the primary question concerned the obligation of the receiver appointed by the state court to surrender the property in his hands to the bankruptcy court.

[3] Moody *v.* Port Clyde Development Co., 102 Me. 365.

[4] Potts *v.* Smith Mfg. Co., 25 Pa. Super. Ct. 206; Peckham's Est., 35 Pa. Super. Ct. 330.

[5] Mauran *v.* Crown Carpet Lining Co., 23 R. I. 324.

[6] *Re* Watts, 190 U. S. 1; *Re* Storck Lumber Co., 114 Fed. 360; *Re* Knight, 125 Fed. 35; *Re* English, 127 Fed. 940, 62 C. C. A. 572; *Re* C. Moench & Sons Co., 130 Fed. 685, 666 C. C. A. 37.

tion be made to the court which appointed the receiver requesting the surrender of the property.[1] Whether the receivership was begun more or less than four months prior to the bankruptcy proceedings should make no difference unless the suit in which the receiver was appointed operated as an equitable attachment of the property.[2] If such was the case, and the attachment was more than four months old, the receiver would be entitled to retain the property as a means of enforcing the creditor's equitable attachment.[3] Another exception to the obligation of a receiver to surrender immediately to the bankruptcy court arises where the receivership is incidental to the foreclosure of a creditor's valid mortgage or lien. As the bankruptcy court does not generally interfere with the right of a secured creditor to enforce his claim against his security, in the same way he would have done had bankruptcy not supervened,[4] the receiver may properly continue to hold the property as a step to such enforcement.[5] It must be remembered, however, that a court of bankruptcy has power even in such a case, if it deems it for the advantage of those interested in the property, to order a sale of the security free from mortgages and liens after due notice has been given to the mortgagees or lien holders so that they have an opportunity to defend their interests.[6]

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[1] *Re* Watts, 190 U. S. 1; Carling *v.* Seymour Lumber Co., 113 Fed. 483, 491, 51 C. C. A. 1; Ross-Meeham Foundry Co. *v.* Southern Car & Foundry Co., 124 Fed. 403; Mauran *v.* Crown Carpet Lining Co., 23 R. I. 324.

[2] *Re* English, 127 Fed. 940, 62 C. C. A. 572.

[3] Pickens *v.* Roy, 187 U. S. 177. In Frazier *v.* Southern Loan & Trust Co., 99 Fed. 707, Goff, J., said: "The Bankruptcy Act of 1898 does not in the least modify this rule [that a court which first obtains rightful jurisdiction over the subject matter of a suit should not be interfered with], but with unusual carefulness guards it in all its detail, provided the suit pending in the State Court was instituted more than four months before the District Court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject matter of such controversy." And this passage was quoted with approval in Pickens *v.* Roy, 187 U. S. 177, but it seems that the principle as applied in bankruptcy should be confined to cases where the appointment of a receiver creates an equitable lien in favor of the plaintiff. The mere fact that a state court is in possession and has been in possession of property for a long time should not limit the right of the federal bankruptcy court to the possession of the property if it belongs to a bankrupt. The principle enunciated by Judge Goff is applicable in its entirety only where the competing courts are of coördinate jurisdiction, while the bankruptcy court in regard to bankruptcy matters is a court of superior jurisdiction. See *Re* Watts, 190 U. S. 1.

[4] Eyster *v.* Gaff, 91 U. S. 521; Carling *v.* Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1; Harvey *v.* Smith, 179 Mass. 592.

[5] Ross-Meeham Foundry Co. *v.* Southern Car & Foundry Co., 124 Fed. 403.

[6] Ray *v.* Norseworthy, 23 Wall. (U. S.) 128, 135; *Re* Pittelkow, 92 Fed. 901, and

Where this procedure is adopted the secured creditor is remitted to a right against the proceeds of the security corresponding to that which he previously had against the security itself.

Samuel Williston.

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cases cited; *Re* Granite City Bank, 137 Fed. 818, 70 C. C. A. 316; Sturgiss *v.* Corbin, 141 Fed. 1, 72 C. C. A. 179. See also *Re* Kaplan, 144 Fed. 159; Orr *v.* Tribble, 158 Fed. 897.